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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN JOSE RADILLO,

Defendant and Appellant.

B145466

(Super. Ct. No. TA102513)

APPEAL from a judgment of the Superior Court of Los Angeles County, James A. Kaddo, Judge. Affirmed.

Daniel Hustwit for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Acting Chief Assistant Attorney General, Marc E. Turchin, Acting Senior Assistant Attorney General, John R. Gorey, Supervising Deputy Attorney General, and Steven E. Mercer, Deputy Attorney General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Juan Jose Radillo appeals from a judgment entered after a jury convicted him of two counts of attempted murder<sup>1</sup> (Pen. Code, §§ 664, 187, subd. (a)) and two counts of assault with a firearm (*id.*, § 245, subd. (a)), during which he personally used a firearm (*id.*, § 12022.5, subd. (a)(1)). The jury also found that during the commission of the attempted murders, a principal personally and intentionally discharged a firearm (*id.*, § 12022.53, subd. (e)(1)), a principal was armed with a firearm (*id.*, § 12022, subd. (a)(1)) and defendant personally and intentionally discharged a firearm (*id.*, § 12022.53, subd. (c)). In addition, the jury determined that each offense was committed for the benefit of, at the direction of and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members within the meaning of Penal Code section 186.22, subdivision (b)(1). The trial court sentenced defendant to state prison for 32 years.<sup>2</sup> We affirm the judgment.

## STATEMENT OF FACTS

On July 6, 1999, at about 7:30 p.m., Gloria Sturdivant (Sturdivant) was sitting in a parked car with a friend near the intersection of Kemp and Rosecrans Avenues in Compton. Sturdivant saw a small car and a truck with a shell pull up in front of a vacant commercial building. Inside the vehicles was a total of three men. The defendant and another man got out and marked gang graffiti on the wall of the building over existing graffiti. Sturdivant then saw them shoot at her house. After the shooting, the two men

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<sup>1</sup> The jury found that the attempted murders were not willful, deliberate and premeditated.

<sup>2</sup> Defendant was charged and tried together with co-defendant Gabriel Ofelio Morales. The jury acquitted co-defendant Morales of all charges.

ran to the vehicles and drove away. Sturdivant later identified defendant at a field identification as one of the shooters.

On July 6, 1999, Ruthetta Rainey (Rainey) lived on the corner of Cherry Street and Kemp Avenue in Compton. That evening, Rainey was at the gate to her home with Damon Pugh. Rainey looked up Kemp Avenue toward Rosecrans Avenue and saw two Hispanic men running toward her. Both of them had handguns. She focused on the one closest to her. He was thin and wore a black hooded sweatshirt. As he approached, he put his hood over his head. When he was about 12 feet away, he began firing at her and Damon, who was standing right next to her. Rainey sought cover. Neither Rainey nor Damon was shot.<sup>3</sup> Later, at a field identification, Rainey identified defendant as the shooter.<sup>4</sup>

Ricardo Landeros (Landeros), a detention officer for the Los Angeles County Probation Department, was driving westbound on Rosecrans Avenue around 7:30 p.m. on July 6, 1999, when he saw a truck and a Honda Accord with two occupants pull over near the corner of Rosecrans and Kemp Avenues. Landeros then observed the passenger of the car and the passenger of the truck get out. He described both men as bald, thin Hispanic men, wearing white T-shirts. The men ran north on Kemp, where they appeared to have an argument with an African-American man. One of the men who had gotten out of the car reached into his waistband, pulled out a handgun and fired repeatedly at the African-American man. The intended victim ran north on Kemp and then turned west on Cherry Street.<sup>5</sup>

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<sup>3</sup> At trial, Rainey was frightened. She did not want to testify, in that her house had been shot at repeatedly since the incident.

<sup>4</sup> Rainey was unable to identify anyone at a subsequent live lineup.

<sup>5</sup> Landeros explained that Rosecrans Avenue and Cherry Street are parallel streets. Kemp Avenue intersects both Rosecrans and Cherry.

At some point, Landeros noticed a third, heavysset Hispanic man in the fray. He did not see where this man came from, however. The driver of the Honda remained seated in the car during the shooting.

After the shooting, Landeros saw the three Hispanic men return to the vehicles. The shooter got into the passenger seat of the Honda. Another man got into the passenger seat of the truck. The third, heavysset man got into the shell of the truck. The vehicles then drove off. Landeros confirmed that when the Honda left the curb on Rosecrans Avenue, there were only two men inside.

Upon witnessing the shooting, Landeros wrote down the license number of the Honda. After the car and the truck drove away, he decided to follow them. When the two vehicles went in different directions, Landeros decided to follow the car carrying the shooter. He called 911 and followed the Honda until two police units took over the chase. At no time did Landeros see anyone do anything to any wall.

Compton Police Officers Eduardo Verdugo and Victor Locklin responded to Landeros's call, intercepted the Honda and pursued it with their siren and lights turned on. There were two occupants inside the Honda. Co-defendant Morales was driving. Defendant was in the passenger seat. While attempting to escape, co-defendant Morales crashed the Honda into a fire hydrant on the corner of Elm Street and Tamarind Avenue. When the officers arrived, defendant and co-defendant Morales were gone.

Backup arrived and officers sealed the area. About 20 to 25 minutes later, Officer Verdugo saw co-defendant Morales come out of a nearby house. He was arrested without incident. Officers then searched the house and its garage. They found defendant hiding in the garage.<sup>6</sup> Defendant was arrested after a violent struggle. Later, at the police station, Officer Locklin spoke to one Lonnie Hall, who informed him that he had been at the corner of Tamarind Avenue and Spruce Street when he saw a blue Honda fleeing from the police. Hall saw someone in the car throw a handgun out of the window. Hall

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<sup>6</sup> The owner of the house did not know defendant or co-defendant Morales and had not given them permission to be on his property.

picked up the weapon, which he described as a .38 caliber revolver, and gave it to another person.<sup>7</sup>

## **CONTENTIONS**

### **I**

Defendant contends he was denied his constitutional right to the effective assistance of counsel due to a conflict of interest.

### **II**

Next, defendant asserts that the trial court improperly instructed the jury on the natural and probable consequences doctrine.

### **III**

Finally, defendant contends the trial court abused its discretion by impermissibly limiting his cross-examination of Sturdivant.

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The police did not recover any weapons. Officer Mark Metcalf recovered six nine-millimeter shell casings, which had been expended from a semiautomatic handgun, near the Cherry Street residence, however.

## DISCUSSION

### I

Defendant contends he was denied his constitutional right to the effective assistance of counsel due to a conflict of interest. We disagree.

#### Relevant Facts

Defendant and Morales were charged as co-defendants in this case. Jesus Cortez (Cortez), the heavysset individual present during the shooting, was charged separately with the same offenses.<sup>8</sup>

At trial, Matthew Fletcher represented defendant. Daniel Hustwit, who represents defendant on appeal, represented co-defendant Morales. Judge James A. Kaddo presided over the trial, which commenced on June 19, 2000.

During his opening statement to the jury, the prosecutor maintained that defendant was the shooter, although Cortez was present at the scene. Attorneys Fletcher and Hustwit both stated the evidence would show that Cortez was the shooter rather than defendant or co-defendant Morales.

At some point, Judge Kaddo learned that Attorney Fletcher was representing defendant and Cortez concurrently. Armed with this information, Judge Kaddo notified the trial judge presiding over Cortez's case and learned that Cortez had waived any conflict. Judge Kaddo, believing there to be no conflict as to defendant, said nothing to defendant and permitted the case to proceed to verdict.

On August 9, 2000, the original date set for sentencing, defendant requested that Attorney Fletcher be relieved as his counsel. He further stated that he wanted to retain Attorney Hustwit, who represented co-defendant Morales. Joe Pardoe appeared on

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<sup>8</sup> This fact is gleaned from the reporter's transcript. The appellate record contains no documents from the Cortez case.

behalf of Attorney Hustwit for the purpose of requesting a continuance of the sentencing hearing. Judge Kaddo allowed him to appear for that day's appearance only after obtaining an express waiver from defendant of any conflict of interest that Attorney Hustwit might have and of his right to be sentenced within 21 judicial days. Attorney Fletcher remained defendant's counsel of record.

On August 16, 2000, Judge Kaddo heard and considered defendant's request to relieve Attorney Fletcher and retain Attorney Hustwit. Both attorneys were present. Also present was Deputy Public Defender Ary De Groot, an impartial attorney who the court asked to advise defendant regarding the possible existence of a conflict of interest.

Judge Kaddo confirmed that defendant had been advised fully of the possibility of a conflict of interest and the consequences of waiving that conflict. Defendant then expressly waived any claim of conflict of interest with respect to Attorney Hustwit's representation.<sup>9</sup> Judge Kaddo permitted Attorney Fletcher to withdraw as defendant's counsel of record and substituted Attorney Hustwit in his place.

On September 26, 2000, defendant, now represented by Attorney Hustwit, filed a motion for a new trial on the ground that he had been denied the effective assistance of trial counsel. Defendant specifically argued that Attorney Fletcher's "loyalty and responsibilities were divided between Cortez and Radillo as both were suspected shooters, and Radillo never gave his assent to this conflicting representation."

A hearing on defendant's new trial motion was held on October 12, 2000. Judge Kaddo noted that Attorney Fletcher did not represent Cortez initially. Attorney Fletcher did not appear as Cortez's attorney of record until June 12. From that point on, Attorney Fletcher represented both Cortez and defendant in connection with the same charges, albeit in two different cases. Judge Kaddo further stated that it was his "understanding that Mr. Fletcher and Mr. Cortez were advised that Mr. Fletcher has a conflict of interest because he's representing Radillo as well as Mr. Cortez; that Mr. Cortez chose to waive

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<sup>9</sup>

Attorney Hustwit made it clear that defendant was not waiving any conflict claims relating to Attorney Fletcher's representation of him and Cortez.

after independent counsel being appointed for him to advise him on the issue of waiver of a conflict of interest; that initially he did not wish to waive and the next morning he changed his mind and agreed to waive and Fletcher was allowed to remain as the attorney for Cortez as well as for Radillo.”

Upon learning there was a conflict, Judge Kaddo called Judge Cheroske and said “I’ve got a clear conflict of interest as far as Cortez is concerned because Mr. Fletcher who’s representing Radillo is telling me that Cortez is the one that did the shooting and Mr. Radillo is innocent, he didn’t do anything, that the officer perjured himself . . . in a preliminary hearing. That’s what he testified to and he’s going to come here today and testify that it was Mr. Radillo that did the shooting.

“And I was told that Mr. Cortez had waived any conflict of interest and I proceeded with the trial.

“I did not advise Mr. Radillo that Mr. Fletcher has a conflict of interest with respect to him because his position, court’s thinking and understanding was that Mr. Fletcher’s position was that it was Cortez who did the shooting and he’s the guilty party and Mr. Radillo is innocent.

“Not only the court—my clear recollection is not only did I not advise Mr. Radillo that Mr. Fletcher had a conflict of interest, the court did not see any conflict of interest. I did not see it.

“You’ll have to understand, no evidence had been presented. I haven’t heard from any witnesses. These were just discussions. I don’t know if it was in connection with motions. I don’t know that. It was before we began the trial that I became aware that Mr. Fletcher had a serious conflict of interest with respect to Mr. Cortez because of his representation that the evidence will show and that the investigating officer as well as the other officers have perjured themselves because they have testified that it was Mr. Cortez that was the defendant who fired the gun and that Mr. Radillo is innocent and he’s being unjustly prosecuted.



“I did not advise Mr. Radillo. I did not see the need to advise him based upon Mr. Fletcher’s representation to me. And further, I only saw the conflict as far as Cortez is concerned.

“Mr. Radillo was present in court, the record should reflect, when I raised the issue of conflict of interest as far as Mr. Cortez is concerned.

“So that’s the court’s recollection of what transpired in my court and, essentially, what Mr. Hustwit is relating to me in his motion for new trial is factually correct. . . .”

The prosecutor then stated that “[he had] two points. And I thought the court file would reflect the first. And that was that Radillo was—the independent counsel was appointed for Radillo at the time that Fletcher considered—” The court interjected: “We have to proceed on the assumption that according to the record, to my file and whatever minute orders have been generated from the Cortez file, there was no such indication. But you were present. I don’t take precedence over your memory.” The following discussion then transpired:

“[THE PROSECUTOR]: Yes, I think if we check the reporter’s notes, it would show that. But beyond that, there’s simply no case for the idea that Radillo was ineffectively represented by Mr. Fletcher. He vigorously represented him, challenged the People’s case at every point, urged the idea that Cortez had the gun, not Radillo. That at that exact point that was supposed to be the conflict was a point that Fletcher made and vigorously supported in his case. Certainly it was ardently argued in front of the jury.

“I remember that Mr. Hustwit himself wanted just one thing to be seen by the jury in opening statement. And that was a sign that said Cortez was there, was one shooter and that shooter was Cortez. So that point was vigorously made in front of the jury.

“Counsel makes the point that, makes simply one point, I think that I can find, as to how Fletcher was in any way ineffective and that was that he didn’t call as a witness Jesus Cortez. But of course, Cortez had a Fifth Amendment right not to be called.

“And certainly counsel doesn’t make any assertion as to what Cortez [would have] testified [to] had Cortez been called.”

At this point, Mr. Hustwit stated that “[i]t’s not just that Cortez wasn’t called. Mr. Fletcher can yell and scream all he wants. That’s not effective assistance. I pursued the angle that there was one shooter, the shooter was Cortez. But when I say something in opening statement, that’s not evidence. I, because of the defendant I was defending, it wasn’t incumbent upon me to develop further evidence.

“Fletcher, however, could have developed evidence as to the—first of all, he could have called Cortez but how can he call Cortez when he’s Cortez’s attorney? At least, a vigorous defense attorney would have subpoenaed Cortez into court and then Cortez may have taken the Fifth Amendment, maybe not.

“But furthermore, a vigorous attorney doing his job would have developed facts regarding Cortez’s truck: Who was the owner of the truck? What kind of truck is Cortez [*sic*]? They would have put Cortez at the scene. If the vigorous attorney could have put Cortez at the scene, they could have also put Cortez in possession of a handgun. However, Cortez’s family was present in our court for a lot of the trial.

“Fletcher couldn’t develop the case like he should have because of his allegiance to Cortez and the Cortez family. Then after everything is said and done, Cortez doesn’t go to trial after all. He gets the benefit of Radillo kind of falling on the grave for him and gets a four-year deal for exactly the same charges that Radillo was accused of.

“So to say that Fletcher’s representation of Radillo was effective, I think is incorrect. It was not effective. It was circuitous. There was no focus. And there couldn’t have been focus because his hands were tied by his representation of Cortez.

“While he put on a show, his show completely lacked any substance of opening—there was one factual discrepancy I’d like to clear up with the court’s recollection. [¶] It conflicts with mine just slightly on one area. And that was when the court raised the issue of conflict in this court, my recollection was that was raised during a recess and the court’s exact words were, ‘I see the word “conflict” on the ceiling in big letters.’

“THE COURT: I said, did you ever hear of the word ‘conflict,’ or I see.

“MR. HUSTWIT: On the ceiling big letters, something like that. And my recollection was neither defendant was present and it was—the court was not in session at

the time, but the attorneys were milling about waiting for something. That's the only factual difference that I have.

“THE COURT: You may very well be correct. [¶] I don't recall specifically. I recall we did not have a jury. I recall it was before the trial began and I don't recall how I became aware that Fletcher was representing Cortez. I may have even been walking off the bench. All I know is I came to a dead stop and almost had a heart attack.

“MR. HUSTWIT: It was because Fletcher was appearing that same day in both this case and on Cortez upstairs. [¶] That's how you became aware of it.

“THE COURT: I don't recall. All I know is, all of a sudden, big flash, occurred in front of my eyes. I became aware that Fletcher was representing Radillo and Cortez and I came to a dead stop and I said, you know, something like I see the big—up in the sky the big word ‘conflict’ or does the word ‘conflict’ mean anything to you, Mr. Fletcher.

“I recall I was, to say the least, rudely awakened. And I know I called upstairs. I know I made a call to Judge Cheroske to bring it to his attention. And I became aware of it. That's all I can say, and I brought it to Mr. Fletcher's attention that he does have a conflict and that was my recollection.

“But in any event, Mr. Radillo was aware that Mr. Fletcher represented both Mr. Cortez and himself. I don't know to what extent Mr. Radillo was present [during] any of the Cortez proceedings. The record doesn't reflect, but clearly Mr. Radillo knew that Mr. Fletcher represented both he and Mr. Cortez. Mr. Fletcher didn't make a secret out of it.

“MR. HUSTWIT: I agree with that. It's that Radillo did not know the ramifications of this representation. . . .”

After entertaining further arguments, Judge Kaddo denied defendant's motion for new trial. He specifically found that defendant had not been deprived of the effective assistance of counsel.

## **Applicable Law**

The right to effective assistance of counsel includes the right to representation free from conflicts of interest. (*People v. Sanchez* (1995) 12 Cal.4th 1, 45; *People v. Clark* (1993) 5 Cal.4th 950, 994.) Conflicts of interest include ““all situations in which an attorney’s loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests.”” (*Sanchez, supra*, at p. 45; *Clark, supra*, at p. 994.) In such situations, “the caliber of [the attorney’s] services may be substantially diluted.” (*People v. Hardy* (1992) 2 Cal.4th 86, 136; *Aceves v. Superior Court* (1996) 51 Cal.App.4th 584, 590.)

Under the federal constitution, a defendant who did not object to the conflict of interest during trial must show that his counsel’s performance was affected adversely by an actual conflict of interest. (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 348.) Stated otherwise, a defendant must demonstrate that his trial counsel ““actively represented conflicting interests.”” (*Burger v. Kemp* (1987) 483 U.S. 776, 783.) The possibility of a conflict is not sufficient to impugn a criminal conviction. (*People v. Clark, supra*, 5 Cal.4th at p. 995.)

The showing necessary under the state constitution is different. A defendant need not prove an actual conflict of interest. He or she need only demonstrate that the record supports an “informed speculation” that counsel’s representation was affected adversely by the claimed conflict. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1009.) Under this state standard, defendant is required to show that the “alleged conflict prejudicially affected counsel’s representation of the defendant.” (*People v. Clark, supra*, 5 Cal.4th at p. 995.)

## **Analysis**

At the motion for new trial, Attorney Hustwit acknowledged that defendant knew that his trial counsel simultaneously represented him and Cortez. Defendant did not object to the conflict during trial, however.

On appeal, defendant does not argue that Attorney Fletcher had an actual conflict of interest. Rather, defendant argues in conclusionary fashion that he “never got to adequately pursue the theory that Cortez was the shooter because his lawyer represented Cortez.” Defendant does not specify what Attorney Fletcher failed to do in pursuit of that theory, however. Defendant does not argue that Attorney Fletcher failed to introduce critical evidence or subpoena specific witnesses whose testimony would have exonerated him of criminal wrongdoing. Defendant does not point to any specific act or omission on the part of Attorney Fletcher the absence of which would have led to a result more favorable to him. Defendant’s bald assertion of ineffective assistance of counsel simply is insufficient to establish entitlement to relief under either the federal or state standard.

Next, defendant argues that he was the “fall guy” who “fell on the grenade for Cortez,” in that Cortez never had to risk going to trial and was given a four-year offer after defendant was convicted. That defendant went to trial before Cortez, who received a favorable plea offer from the prosecution following defendant’s conviction, in no way establishes that defendant was deprived of the effective assistance of counsel during trial.

Defendant finally argues that the trial court should have advised him of Attorney Fletcher’s conflict. In *People v. Frye* (1998) 18 Cal.4th 894, the California Supreme Court stated that “[w]hen a trial court is aware, or should be aware, of a possible conflict of interest between a criminal defendant and defense counsel, the court is required to inquire into the circumstances of the possible conflict and take whatever action may be appropriate. [Citation.] A trial court’s failure to carry out its duty to conduct such an inquiry, or to take action based on the results of its inquiry, denies the defendant the right to due process. [Citation.] A conviction will be reversed on the ground the trial court failed to satisfy its duty to inquire into a possible conflict, or to adequately respond to its inquiry, only where the defendant demonstrates that an actual conflict of interest existed, and that the conflict adversely affected counsel’s performance. [Citations.]” (At p. 999.)

In this case, Judge Kaddo knew early on that Attorney Fletcher concurrently represented defendant and Cortez. Although Judge Kaddo ascertained that Cortez had executed a waiver of the conflict, he did not discuss the possibility of a conflict of interest

with defendant. We recognize that Judge Kaddo believed in good faith that no conflict of interest existed. Since the evidentiary portion of the trial had not yet begun when Attorney Fletcher's dual representation was discovered, however, the potential for conflict existed. Surely, the better practice would have been to advise defendant of the possible conflict, conduct the requisite inquiry and either obtain a waiver from defendant or permit him to hire new counsel or appoint new counsel to represent him. This Judge Kaddo failed to do. Inasmuch as defendant has failed to establish that any conflict of interest adversely affected Attorney Fletcher's performance, however, reversal is not warranted. (*People v. Frye, supra*, 18 Cal.4th at p. 999.)

In summary, we conclude that defendant has failed to demonstrate that Attorney Fletcher's performance was affected adversely by an actual conflict of interest (*Cuyler v. Sullivan, supra*, 446 U.S. at p. 348; *People v. Frye, supra*, 18 Cal.4th at p. 999) or that the record supports an "informed speculation" that counsel's representation was affected adversely by the claimed conflict (*People v. Kirkpatrick, supra*, 7 Cal.4th at p. 1009).

## II

Next, defendant asserts that the trial court improperly instructed the jury on the natural and probable consequences doctrine. Instructional error, if any, was harmless.

Over defendant's objection, the trial court instructed the jury pursuant to CALJIC No. 3.02 (2000 Re-revision) that "[o]ne who aids and abets another in the commission of a crime or crimes is not only guilty of that crime or those crimes, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crimes originally aided and abetted.

"In order to find the defendant guilty of the crimes charged in each Count you must be satisfied beyond a reasonable doubt that:

- "1. The crime[] of vandalism was committed;
- "2. That the defendant aided and abetted [that] crime[];

“3. That a co-principal in that crime committed the crimes of assault with a firearm and attempted murder; and

“4. The crimes of assault with a firearm and attempted murder were a natural and probable consequence of the commission of the crime of vandalism.

“You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of an identified and defined target crime and that the crimes of assault with a firearm and attempted murder were a natural and probable consequence of the commission of that target crime.

“Whether a consequence is ‘natural and probable’ is an objective test based not on what the defendant actually intended but on what a person of reasonable and ordinary prudence would have expected would be likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A ‘natural consequence’ is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. ‘Probable’ means likely to happen.”<sup>10</sup>

Defendant argues that the natural and probable consequences doctrine is inapplicable, in that attempted murder, a specific intent crime, is not a reasonably foreseeable consequence of the crime of vandalism. He maintains that “[t]he attempted murder was an intervening act not part of a natural progression of events.” We need not and do not resolve these issues. Assuming for the sake of argument that the trial court erred in instructing the jury with CALJIC No. 3.02, the error was harmless.

The jury found that defendant personally used a firearm within the meaning of Penal Code section 12022.5, subdivision (a)(1), during the commission of all crimes and personally and intentionally discharged a firearm within the meaning of Penal Code section 12022.53, subdivision (c), during the commission of both counts of attempted

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<sup>10</sup>

The trial court also gave the jury an instruction defining the target crime of vandalism. This offense was not charged separately, however.

murder. These findings unquestionably confirm that the jury found that defendant was the direct perpetrator of each crime and that the jury did not convict him as an aider and abettor under the natural and probable consequences doctrine.

### III

Finally, defendant contends the trial court abused its discretion by impermissibly limiting his cross-examination of Sturdivant. We reject this contention.

The record refutes defendant's conclusionary assertion that the trial court prevented his trial counsel from ascertaining what Sturdivant was doing at the time she made her observations. During redirect examination, Sturdivant identified defendant as one of the shooters. When Attorney Fletcher thereafter attempted to ask Sturdivant questions designed to challenge her ability to observe, the trial court ruled that counsel was exceeding the scope of redirect examination. At a side bar conference, Attorney Fletcher stated he wished to inquire about Sturdivant's ability to perceive on the night in question. The trial court stated that counsel should have inquired into Sturdivant's ability to observe during cross-examination. Counsel argued that he had been unable to do so since Sturdivant had not identified defendant as one of the shooters until redirect examination. Following further discussion, the trial court stated, "I will allow two questions on that."

When Attorney Fletcher recommenced his questioning, Sturdivant was very uncooperative.<sup>11</sup> In an obvious attempt to avoid a standstill, the trial court promptly intervened and itself asked Sturdivant a series of questions designed to elicit some of the testimony sought by Attorney Fletcher. Sturdivant testified that while seated in the car, she was looking at the two men who were shooting rather than the person she was with.

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The record reveals that Sturdivant became increasingly uncooperative when questioned by defense counsel. She was afraid to testify. In January 2000, two of defendant's associates beat her.



She further related that she was approximately 35 to 40 feet away from the shooters. When Attorney Fletcher objected that he had the right to cross-examine the witness, the trial court responded, “You’re on, you’re recross-examining the witness. I’m allowing it.” Attorney Fletcher responded, “Yes, I am, your Honor.”

Attorney Fletcher then attempted to question Sturdivant further. In fact, his recross-examination filled up an additional three pages of transcript. Although the trial court sustained objections to the vast majority of Attorney Fletcher’s questions, defendant does not argue on appeal that these objections were sustained erroneously. In summary, we conclude that defendant has failed to demonstrate that the trial court unconstitutionally restricted his right to cross-examine Sturdivant.

The judgment is affirmed.

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SPENCER, P.J.

I concur:

MALLANO, J.

I concur in the judgment only:

VOGEL (MIRIAM A.), J.